IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting.

(Chapter VIII, Rule 32 (2) (b)

Description of the Case.

Criminal Appeal No. 194 of 2002 decided on 08-12-2003

Sewa Singh & another Vs. State of Uttaranchal

Criminal Reference No. 2 of 2002

Approved for reporting

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~~Not approved for reporting~~

Date of decision 08.12.2003 Initial of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL AT NAINTIAL.

Crimianl Appeal No. 194 of 2002

1- Sewa Singh S/o Jagta Singh
R/o village Hasanpur (Chachar)
P.S. Kichha District Udham Singh Nagar.

2- Mukhtyar Singh S/o Harbhajan Singh
R/o village Hasanpur (Chachar)
P.S. Kichha District Udham Singh Nagar ..Appellants.

Vs.

State of Uttaranchal …Respondent.

AND

Criminal Reference No. 2 of 2002

Sri Khalil Ullah Khan, Advocate learned counsel for appellants.
Sri Raman Shah, Advocate learned A.G.A. for respondent-state.

Date: 08-12-2003

Coram: Hon'ble S.H. Kapadia, C.J.
Hon'ble Irshad Hussain, J.

(ORAL JUDGMENT): **(Per: Hon'ble Irshad Hussain J.)**

This is an appeal under section 374 (2) of Code of Criminal Procedure, 1973 (for short 'Code') against the judgment dated 12-7-2002, whereby both the appellants were convicted and sentence of death was passed under section 302 I.P.C.read with section 34 I.P.C. They were also convicted and sentenced to undergo R.I. for five years each under section 377 I.P.C. read with section 34 I.P.C. and R.I. for four years each under section 377 I.P.C. read with section 34 I.P.C. They were, however, acquitted of the charge under section 201 I.P.C. Appellant Sewa Singh was further acquitted of the charge under section 4/25 Arms Act.

2- Criminal reference under section 366 of the 'Code' is submitted by Sessions Judge, Udham Singh Nagar in view of the sentence of death passed against both the appellants, per aforesaid judgment in Sessions Trial Nos. 378/2002 and 379/2000, which were consolidated for trial.

3- Both the appellants aged about 22 years are cousin brothers. They are residents of village Hasanpur within the circle of P.S. Kichha District Udham Singh Nagar. Km. Sukhvinder Kaur aged about 20 years, victim in the instant case, was the daughter of Massa Singh (P.W.1) of the same village. She was a teacher in Shahji pUblic School, Uttam Nagar within the circle of P.S. Baheri. She used to leave her house at about 7.00 a.m. for the school and used to return in the after-noon at about 2.00. This was her routine on school days.

4- As per the prosecution version on 19-8-2000 also she left her house for the school but failed to return till late evening hours. Her father, Massa Singh and other villagers then started making search of her. At about 12.30 in the night between 19/20-8-2000 the dead body of Km. Sukhvinder Kaur was found lying in half naked state with injuries in the sugarcane field of Sukhchain Singh of village Uttam Nagar situate adjacent to the Uttam Nagar-Hasanpur 'Kuchha Rasta'. The sugar cane field is the part of the territory of village Hasanpur. The victim had sustained fatal injuries of sharp edged weapon some time after 1.30 p.m. when she was returning to her house from the school. It was apparent that the victim was forcibly taken inside the sugar cane filed with evil intention on her chastity and when she put resistence she was killed at that spot.

5- Informant, Massa Singh thereafter got prepared the written report (Ext.Ka.1) by scribe Baz Singh and lodged it at P.S. Kichha at 01.05 a.m. on 20-8-2000, whereby check F.I.R. (Ext. Ka.6) was prepared and case under section 302/201 I.P.C. was registered against unknown assailant. Investigation of the case was taken up by incharge of police station S.I. Ram Lakhan Singh Yadav (P.W.10).

6- As part of the investigation services of Sniffer Dog was decided to be taken and as a consequence thereof Dog Handler Shasank Sekhar Shukla (P.W.110 from the dog squad of U.P. C.B.C.I.D. stationed at Bareilly reached with Sniffer Dog 'Goldie' at the scene where the dead body of the victim was lying. The dog was given smell of the deceased and thereafter the dog on tracking went towards village Hasanpur and on reaching at the house of appellant Mukhtyar Singh started barking. The dog wanted to enter inside the house, and soon as appellant Mukhtyar Singh came out the dog started barking on him. Thereafter, the dog tracked towards the house of appellant Sewa Singh and started barking there also and when said appellant came out of the house he too was singled out for barking upon by the dog.

7- In view of above and out of suspicion both the appellants were picked up by the police and were sent for their medical examination at Community Health Centre, Kichha District , Udham Singh Nagar. Medical Officer Incharge Dr. S.H. Chauhan (P.W.9) examined appellant Sewa Singh the same day i.e. 20-8-2000 at 2.00 p.m. and prepared injury report (Ext. Ka. 10). The following injuries were found on the person of the said appellant.

(1) Abrasion of size 6 cm x .25 cm present on right side waist, 30 c.m. away form nevus, redish in colour.

(2)Two small abrasions of size 3 c.m. x .25 c.m. and 4 c.m. x .25 c.m. on right side of upper abdomen, redish in colour.

8- Appellant Mukhtyar Singh was thereafter examined at 2.10 p.m, and injury report (Ext. Ka. 11) was prepared. On his person following injuries were detected:-

(1) Abrasion 1 c.m. x .05 c.m. on right shoulder.

(2) Three abrasions of size 1.5 c.m. x .5 c.m.; 2 c.m. x .5 c.m. and .5 c.m. x .5 c.m. on left shoulder having direction anterior to posterior.

9- In the opinion of the Medical Officer injuries of these appellants were caused by blunt object, these were simple in nature and were probably caused about 24 hours before the medical examination. Medical Officer gave out the probability that these injuries could be sustained by finger nails at about 1.30 p.m. on 19-8-2000.

10- After medical examination the two appellants were let-off and were not detained in connection with the said crime.

11- Meanwhile Investigating Officer Ram Lakhan Singh Yadav (P.W.10) had as part of the investigation seized hair from the ‘Salwar’ of the deceased lying there at the spot, vide seizure memo (Ext. Ka.12). Thereafter, he got the inquest held on the dead body of deceased Sukhvinder Kaur. S.S.I. Kunwar Virasat Ali was deputed for this purpose. Inquest report (Ext. Ka.13) and relevant documents viz., sample seal, letter to C.M.O., challan report, diagram of the dead body (Exts. Ka. 14 to 17) were also then prepared. The dead body was then packed and sealed and dispatched for post mortem through constables Anil Kumar and Lekhraj. From near the dead body one pair of sandle, one purse, a book, a dot pen, a small mirror, four toffees (chocolates), six papers relating to school, one currency note of Rs. 50/- and two of Rs. 10/- each, two pouches of shampoo and thread roll were seized vide memo (Ext. Ka.18). He

also seized blood-stained and plain earth vide memo (Ext.Ka. 19) from the place of incident and thereafter he prepared site plan (Ext.Ka.20). After post mortem the clothes of the deceased were received and relevant articles and the clothe were sent to Forensic Science Lab, Agra for expert report.

12- The appellants were arrested on 29-9-2000 at about 12.30 p.m. in the presence of Surendra Singh (P.W.4) and Devendra Singh and on the disclosure statement the clothes namely a pair of trouser, shirt and under-wear of appellant Sewa Singh and a pair of trouser, shirt, under-wear and head 'Patki' of appellant Mukhtyar Singh were recovered from the house of appellant Sewa Singh as these were kept there in a polethene bag and these clothes the appellants were wearing at the time of the occurrence. The clothes being blood stained were sent to Forensic Science Lab for expert report. The disclosure statement (Ext. Ka.2) and recovery memo (Ext.Ka.3) were also prepared.

13- On 29-8-2000 itself on the disclosure statement of appellant Sewa Singh blood-stained knife was recovered from the bushes on the periphery of the Hasanpur Bhanga Canal, vide memo (Ext. Ka.4) Site plan of the place of the recoveries (Exts. Ka. 21 and Ka.22) were also prepared by the investigating officer. He recorded the statements of the witnesses and on completion of the investigation submitted charge-sheet (Ext. Ka.24) against both these appellants under sections 302/201/376/377 I.P.C. on 22-9-2000.

14- Sub Inspector Balbir Singh (P.W.12) took up the investigation of the case pertaining to recovery of the knife and he submitted charge-sheet (Ext. Ka. 27) against the appellant Sewa Singh under sections 4/25 of the Arms Act on 3.10.2000.

15. During the course of investigation statements of the witnesses recorded revealed that the appellants made extra-judicial confession before witnesses Kulwant Singh (P.W.2) and Paramjeet Singh (P.W.3). it was also disclosed that the two appellants were seen coming out of the sugarcane field of Sukhchain Singh at abaout 2.15 p.m. on 19-8-2000 by witness Amarjeet Singh (P.W.5) and another person and at that time both the appellants were looking nervous and perturbed.

16- As per the prosecution autopsy on the dead body of deceased Sukhvinder Kaur was conducted by Dr. H.L. Kushwaha (P.W.6) at 4.00 p.m. on 20-8-2000 and autopsy report (Ext. Ka.5) was prepared. Medical Officer detected white fluid in anus and vagina and there was an abrasion around anus. Smear of fluid was prepared on sides and swabs in phials were taken. (They were later on

sent to Forensic Science Lal Agra). Ant-mortem injuries detected were as under:-

(1)Incised wound 4”(inch) at level of thyroid cartilage wedge shaped 2” wide, margins sharp, underneath structure cut on thyroid cartilage, neck muscles, both side carotid artery, internal jugular vein and nerves.

(2)Tow incised wounds of size 1 cm x ½ cm x bone deep at medial end of both side of clavical. Margins sharp.

(3)Two incised wounds on nipple of left breast at 11 O’ clock and 4 O’clock position, each of size 1” x ½”, margins sharp and everted. On exposure the two wounds went deep piercing left ventricle of heart which was empty.

(4)Three stab injuries around umbilicus (two left side are below umbilicus). On exposure there is blood in cavity and piercing injury under-neath went upto small intestine.

(5) Incised wound on central part of left buttock 1 cm x ½ cm x 1 cm deep. ¼”x bone deep. Margins sharp, everted.

(6) Incised wound on center of left buttock 1 cm x ½ cm x 1cm deep. Margins sharp, everted.

(7) Multiple abrasions on lateral aspect of left thigh and upper left side of buttock.

(8) A small abrasion on right upper eye-lid.

17- There was semi solid food material in the stomach and digested food material and gases in small and large intestine.

18- In the opinion of the Medical Officer death occurred due to haemorrhage and shock as a result of ante-mortem injuries, about 1 ½ day ago.

19- As stated above tow sessions trials were registered on the criminal cases being committed to the Sessions for trial. Sessions Trial No. 378/2000 pertain to the offences under sections 302,376,377,201 I.P.C. whereas Sessions Trial No. 379/2000 related to the offence under section 4/25 Arms Act against appellant Sewa Singh alone. These were consolidated and were decided by the learned Sessions Judge, Udham Singh Nagar per judgment dated 12.7.2002 as stated above.

20- Appellants pleaded not guilty and contended that they have been falsely implicated by the police. they gave out that they were picked up on 20-8-2000 and were kept confined by the police at the police station till 29-8-2000 and

they were again medically examined on 30-8-2000. They admitted that they were medically examined on 20-8-2000 by P.W.9, Dr. S.H. Chauhan.

21- In order to prove its case the prosecution examined as many as 12 witnesses and relied upon the documents referred above besides Forensic Science Lab report (Ext.Ka.23). Reference to witnesses except P.W.7, Smt. Rajvinder Kaur, real sister of the deceased and P.W.8, S.I. Ram Singh, the Head Moharir of the police station when the F.I.R. was lodged had already been made above. P.W.7 was examined as witnesses of motive and P.W.8 was examined to formally prove the check F.I.R. and G.D. reports etc. We shall however discuss the evidence of the witnesses in the later part of the judgment with reference to the circumstances relied upon against the appellants in this case.

22- At the conclusion of the trial, on appraisal of the evidence of the prosecution and after considering the circumstances the learned Session Judge found the prosecution case as alleged proved with regard to the offences referred above and convicted and sentenced the appellants as aforesaid per judgment and order dated 12-7-2002.

23- We have heard the learned counsel for both the parties and have carefully perused the evidence and material on record with the help of both of them and have also gone through the impugned judgment.

24- There is no direct evidence and the prosecution case solely rests on circumstantial evidence. The circumstances are:-

(1)The two appellants made extra-judicial confession before Kulwant Singh (P.W.2) and Paramjeet Singh (P.W.3).

(2)The appellants were seen coming out of the sugar cane field of Sukhchain Singh at about 2-2.15 p.m. on 19-8-2000.

(3)The medical evidence as to the post mortem of the dead body of the victim and the injury reports of the appellants.

(4)Recovery of blood and semen stained clothes form the house of appellant Sewa Singh on the disclosure statements of the appellants.

(5) Forensic Science Lab report, Ext. Ka.23.

(6) Recovery of blood-stained knife on the disclosure statement of appellant Sewa Singh.

25- Learned counsel for the appellants contended that the circumstantial evidence in the case has not been appraised by the learned Sessions Judge within the parameters settled by a catena of decisions of the Apex Court and

neither circumstances are sufficient to complete a chain to prove the guilt of the appellants nor they exclude every possible hypothesis of innocence of the appellants; that the prosecution story is improbable and the prosecution had not given the true version of the incident before the learned Sessions Judge; that the evidence of extra-judicial confession does not prove that these were true and voluntary; that the deceased was not lastly seen alive in the company of the appellants; that the medical evidence fail to prove the commission of offence of rape or even the attempt as well as unnatural intercourse with the deceased; that the appellants were not taken into custody according to law on 20-8-2000 and the medical evidence in regard to their injuries has no relevance to the incident; that the report of the Forensic Science Lab is also not positive in the sense that the clothes have blood-stains of the same group as that of the deceased; that there is also no positive report about the swab and smear taken from the private part of the deceased and that the evidence of recovery of the knife has no relevance when it was not connected to injuries of victim by the evidence of medical officer. The learned counsel also referred to alleged infirmities in the investigation of the case and submitted that the conviction of the appellants can not legally be sustained.

26- The learned A.G.A. on the other hand has supported the findings of the learned Sessions Judge and submitted that no inference is warranted in the impugned judgment in view of the facts and circumstances of the case and particularly the fact that the complete chain of circumstances having been established by the prosecution it point out only towards the guilt of the appellants.

27- Having giving anxious thought on the matter in the light of the respective submissions of the learned counsel we are of the considered view that the criticism against the impugned judgment except the offence under section 377 I.P.C. is unwarranted and the arguments against it carry no weight in the peculiar facts and circumstances of the case.

28- We may at the out set state that law relating to circumstantial evidence was laid down by the Apex Court a far back as in the year 1952 in the matter of **Hanumant Govind Nargundkar and another Vs. State of Madhya Pradesh; (AIR 1952 SC 343), wherein it was observed thus:**

> **" It is well to remember that in case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established**

should be consistent only wit the hypothesis of the guilt of the accused. Again. The circumstances should be a conclusive nature and tendency and they should be such as to exclude every hypothesis by the one proposed to be proved. In other words, there mst be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

29- A reference may also be made to a later decision in **Sharad Birdhichand Sarda Vs. State of Maharashtra ; (AIR 1984 SC 1622).** The learned counsel for the appellants also placed reliance on this decision. Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution can not be cured by false defence or plea. The conditions precedent in the words of the Apex Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hyp0othesis except that the accused is guilty:

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

30- It is in the light of the above settled legal principles that we have to scrutinize the material on record while appreciating the evidence of the prosecution witnesses examined to prove the chain of circumstances in order to establish the guilt of the appellants.

31- One of the important circumstances highlighted to fasten the guilt on the appellants pertain to extra-judicial confession of the appellants made before P.W.2, Kulwant Singh and P.W.3 Paramjeet Singh. Their evidence was not relied upon by learned Sessions Judge on the ground that they have not cared to take the informant and the police in to confidence soon aftrer the confessions were made by the appellants. Before taking up the re-appraisal of the evidence we would like to refer the law on the point. In **Narayan Singh and others Vs.**

State of Madhya Pradesh; (1985) 4 Supreme Court Cases 26 Their Lordships of the Supreme Court have cautioned that it is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak about such a confession. In a later decision in **Gora Singh Vs. State of Rajasthan; (2001) 2 SCC 205** the Apex Court laid downs the principle relating to extra-judicial confession and when the same can be relied upon by the court it was laid down that-

> **"It is settled position of law that extra-judicial confession, if true and voluntary it can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it can not be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement."**

32- In a recent decision in **State of Rajasthan Vs. Rajaram; 2003 AIR SCW 4097** Their Lordships of the Apex Court have observed that-

> **"An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to the confession, like any other evidence, depends upon the veracity of the witness to whom it has been made."**
>
> **It was further observed that-**
>
> **"If the evidence relating to extra-judicial confession is credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration is matter of prudence and not an invariable rule of law."**

33- In the light of the above settled principles we would now analyse the evidence of the two witnesses of extra-judicial confession examined in the case.

34- P.W.2, Kulwant Singh testified that on 26-8-2000 at about 2.00 p.m. appellants Sewa Singh and Mukhtyar Singh came to him and told that they have made a blunder and police is after them. On being enquired they told him that on 19-8-2000 at about 1.30 p.m. On account of their lust for sexual pleasure, they caught hold of Km. Sukhvinder Kaur at Bhanga Canal and forcibly took her into sugar cane filed of Sukhchain Singh and they one after the other committed forcible rape on her. They also stated that after committing the rape they strangulated the neck of the said victim by her head scarf and also assaulted her by wielding knife to commit her murder. The incident had come

to the notice of the police and they claimed that they were even picked up by the police on 20-8-2000 and were subjected to medical examination and thereafter let-off by the police. The appellants sought the help of the witness so that they may be protected from the clutches of the law enforcing machinery. The witness had then refused to come to the rescue of the appellants and even reprimanded for their unlawful act and commission of offence.

35- The witness was cross-examined with a view to show that he has no status in the society and, therefore, was not in a position to help the appellants and it can not be believed tha the appellants were so indiscreet in selecting such a person for their help. Merely because it is so, we do not find any substance in the argument of the learned counsel that the witness was not a man of status and could not be help to the appellants.. Any person of good character who is serious about his own occupation and do not participate in political or social activities may very well be chosen to seek help and in fact it all depends upon the psychological make up and approach of the person seeking help by making confession before such a person of good character instead of selecting a man having political links and attached to any social organization. The appellants are by their profession tillers of the land and therefore considering their own status there was nothing unusual if they chose this witness to make confession and seek help in the matter. Therefore, we are not inclined to find favour with the submission that the evidence of the witness does not repose confidence. Therefore the learned trial court made an error in not placing reliance on his evidence. We also find no substance in the argument that in a situation like this the witness should have atonce reported the matter to the informant and even to police and in not doing so it adversely effect his credibility.

36- In regard to the evidence of other witnesses P.W.3, Paramjeet Singh it need to be stated that the appellants made extra-judicial confession in similar way before this witness at bout 12.00 p.m. on 26-8-2000 and sought his help so that they may not be brought to book by the police for the offence committed by them. This witness gave out in the cross-examination that he was known to the appellants who used to visit his house. The witness is engaged in transport business and similar argument that witness is not a man of status has been put forward to seek rejection of his evidence. The witness was cross-examined at length but there is nothing to indicate that the confessional statement was not voluntary. The evidence of the witness further indicate that

the confessional statement was not obtained either by coercion or threat and that the two appellants themselves came to him and told all about the offence committed by them to seek the help of the witness from being booked by the police. Merely because the witness was not related to the appellants it can not be accepted that the appellants have had no occasion to come to him for the said purpose. In our view the evidence of both these witnesses inspire confidence and therefore we do not find ourselves in agreement with the inference drawn by the learned Sessions Judge in regard to the reliability of the evidence of these witnesses of extra-judicial confession.

37- The second circumstance relied upon by the prosecution and found established by the learned Sessions Judge pertain to the appellants seen coming out of the sugarcane field of Sukhchain Singh at about 2- 2.05 p.m. on 19-8-2000. The defence has not disputed the fact that death of Km. Sukhvinder Kaur was homicidal and there is absolutely nothing to indicate that the place of the incident had been changed in this case. The dead body was found lying in the sugarcan field of Sukhchian Singh. The place of occurrence has been shown in site plant Ext.Ka.20. Witness Amarjeet Singh (P.W.5) testified that on 19-8-2000 at about 2- 2.15 p.m. he happened to pass by the sugarcane field of Sukhchain Singh on his bicycle alongwith Lakhvinder Singh and at that time he saw that two appellants Sewa Singh and Mukhtyar Singh came out of the sugarcan field and both of them were looking perturbed and nervous. The witness, however, proceeded to reach is house that day and thereafter went away to his relation's house for a week. He had disclosed this thing to the investigating officer after about a week. The witness is resident of village Uttamnagar within the circle of P.S. Baheri and as submitted there can be no doubt that the place of occurrence is not far away form his house and the news of recovery of the dead body of the deceased must have reached the inhabitants of his village also the very day of the recovery of the dead body. Since the witness had gone away for a week the delay in recording his statement by the investigation officer can not be taken to disbelieve his evidence. Learned counsel for the appellants pointed out hat the witness had not seen any blood marks on the clothes of the appellants at that time and this aspect not only belie him claim but also the prosecution version regarding the recovery of blood-stained clothes of the appellants on their disclosure statements. The witness admitted to have seen the two appellants coming out sugar cane field of Sukhchain Singh from a distance of about 8-10 feet but it was not necessary

that the witness was supposed to observe the blood marks also on the clothes of the appellants. The witness was at that time going on his bicycle and if he had not observed the blood marks it make little difference so far as his credibility is concerned. The witness knew the appellants form before and question of any mistake in fixing their identity also does not arise and we find nothing of substance in his cross-examination as may warrant rejection of his evidence on this point.

38- Learned counsel for the appellants with a view to discredit the testimony of the witness submitted that the time of the incident as suggested by the prosecution does not stand corroborated by the medical evidence and that in the totality of the circumstances of the case it can not safely be believed that the witness had seen the appellants coming out of the sugar cane field at that time. According to prosecution the victim was assaulted and murdered near about 1.30 p.m. on 19-8-2000 at the place where the dead body was recovered. According the Medical Officer Dr. H.L. Kushwaha (P.W.6) the death of the deceased had probably occurred 1 ½ day before the post mortem conducted at 4.00 p.m. on 20-8-2000. Learned counsel submitted that as per this medical evidence the death had probably occurred some time in the early morning hours of 19-8-2000 and, therefore, the said witness could not have seen the two appellants coming out of the sugar cane field at about 2.15. on 19-8-2000. it is well settled that medical evidence is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerized or mathematical fashion so as to be so accurate to the last second. (See **P.Venkaiah Vs. State of Andhra Pradesh; AIR 1985 Supreme court 1815).** It is also settled that if there is positive evidence of witness, the medical evidence as to the time of death can not be taken to contradict it, the reason being that the report of he medical officer is at best an opinion only. In the present case the evidence of the informant Massa Singh (P.W.1), who is the father of the deceased is definite about routine of the deceased on school days and which has been stated in the earlier part of the judgment. The evidence is definite and unrebutted on the point that he deceased had on that day gone to her school but could not return home by the usual time near about 1.30 p.m. and was lateron found murdered. Learned counsel for the appellants argued that this witness had not testified that information was obtained form the school that the deceased in fact on, 19-8-2000, attended the school and left it to return to her house by the usual time of about 1.30 p.m. and therefore the claim about

the time of incident is not established. We find no force in this argument because the evidence of the witness is definite that the deceased having not returned to the house that day search was made by him and others till the recovery of the dead body and this itself indicate that the deceased left the house in the morning to attend the school, she reached there and left the school as the usual time in the afternoon. Therefore, it has to be accepted that she was picked up and sexually assaulted and thereafter murdered when she was returning form the school on that day i.e. 19-8-2000 and the place being not far off from her home village, the occurrence probably took place near about 1.30 p.m. that day.

39- The presence of some solid food material in the stomach was also referred to by the learned counsel to support his argument that he victim might have been assaulted soon after she left her house for the school on 19-8-2000. We are not inclined to accept this submission because presence of digested food material in the small and large intestines give an indication that the death occurred in the afternoon when she was returning form the school as she must have taken the eatables in the morning while leaving for the school and the eatables and food material got digested by the time she was returning to her house. In this connection we would like to mention that it is also settled that the state of the contents of the stomach found at the time of the medical examination is not a safe guide for determining the time of the occurrence because that would be a matter of speculation in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of **[Puran Singh Vs. State of Punjab; 1995 SCC (Cri) 1143].** Having considered these aspects we find no merit in the argument of the learned counsel that time of the fatal assault on the deceased as given by the prosecution does not stand established and in turn the evidence of the above witness P.W.5 does not inspire confidence. In short we agree with the inference drawn by the learned trial court that the assailants were seen by the witness at about 2.15 p.m. on 19-8-2000 coming out of the sugar cane field of Sukhchain Singh form where the dead body of the deceased was recovered and at which place she was in every probability assaulted.

40- The next circumstance relied upon by the prosecution relates to the medical evidence as regards the rape or in any case attempt to rape and thereafter causing fatal injuries on the person of both the appellants showing that these were sustained when the deceased resisted the attempt on her

chastity. The medical evidence of the case has been reproduced in the earlier part of the judgment and although the Medical Officer Dr. H.L. Kushwaha (P.W.6) has not given any opinion that rape was in fact committed on Km. Sukhvinder Kaur but we can not lose sight of the fact that the dead body of the victim was found lying in half naked state. The evidence in this regard has not been disputed. The presence of ante –mortem injuries on her left thigh and upper left side of buttock give an indication that there was definitely an assault against her chastity. Deceased was a young girl of about 20 years and internal examination of her private organs could not have however resulted in positive inference about commission of the rape and therefore the presence of injuries and the manner in which she had been killed by causing injuries of sharp edged weapon clearly lead to an inference that after the assault against her modesty she had been murdered.

41- As pointed out earlier the evidence of Dog Handler P.W.11, Shasank Shekhar Shukla corroborated by the evidence of I.O., P.W.10, Sub Inspector Ram Lakhan Yadv and sniffer dog tracking evidence admissible under section 45 of the Evidence Act is to the effect that the dog 'Goldie' tracked up to the two appellants after the dog was made to smell the dead body on 20-8-2000. P.W.11, also filed extract of register, Ext. Ka.25 which contain the entries of his engagement for this purpose. The dog tracking evidence led to picking up the two appellants on 20-8-2000 and they were sent for medical examination. The evidence has been referred in the earlier part of the judgment which proved that both the appellants have sustained abrasions at about 1.30 p.m. on 19-8-2000, which is the probable time of the commission of the offences in the instant case. The abrasions according to Dr. S.H. Chauhan (P.W.9) were probable caused by finger nails. These were on the right side waist and upper abdomen of appellant Sewa Singh and whereas abrasion were found on the both shoulders of appellant Mukhtyar Singh. None of the two appellants could give any explanation about the presence of these abrasions on their persons as their defence is bare denial. Considering these injuries having been receiving at the time of the assault on the chastity of the deceased was made and thereafter she was fatally assaulted lead to a legitimate inference that deceased Km. Sukhvinder Kaur must have resisted sexual assault and that process the two appellants had sustained nail injuries.

42- Learned counsel for the appellants submitted that neither any injury on the genitals of the appellants was detected nor any opinion about the absence of smegma was given by the medical officer and in a situation like this it would not be safe to draw inference of sexual assault on the victim. Mere absence of any injury on he genitals has no relevance because it is not necessary that a victim would be successful in causing injury to the genitals of the culprits when sexual assault is made. Further examination of smegma loses all importance when the culprit is examined twenty hours after the occurrence (See, **S.P.Kohli Vs. Punjab and Haryana High Court; AIR 1978 Supreme Court 1753).** It need to be pointed out here that the appellants were examined after about 24 hours of the occurrence. In the face of the facts of the case and the circumstances as made out from the evidence as discussed above the learned Sessions Judge has also rightly drawn the inference that the sexual assault was made on the victim and the appellants were caused abrasions by nail of the victim who resisted attempt on her chastity.

43- Now we proceed to deal with the remaining circumstances at serial Nos. 4 , 5 and 6 as these could be taken together since the witnesses in this behalf are common and evidence is inter-connected. In regard to the recoveries of the various articles there is evidence of Investigating Officer Ram Lakhan Singh Yadav (P.W.10) and public witness Surendra Singh (P.W.4). Their evidence is consistent with the prosecution version that both the appellants were arrested on 29-8-2000 at about 12.30 p.m. in the presence of another public witness Devendra Singh and other police personnel. The appellants were interrogated and on their disclosure statements recoveries as stated in the earlier part of the judgment were effected. The appellants have kept concealed their clothes stained with blood and one of the items namely under-wears stained with semen in the house of one of the appellants Sewa Singh and their clothes recovered were duly identified in evidence and exhibited as Material Exts. 2 to 8. Learned counsel for the appellants argued that recovery of the incriminating articles on the joint disclosure statement of the two appellants is not legally admissible in evidence under section 27 of the Evidence Act. He pressed into service the decision of Division Bench of Allahabad High Court in **Saudan Singh and another Vs. State; 1994 (31) ACC 399.** In the reported case placing reliance on a decision of the Apex Court in the case of **Ram Kishan vs. State of Bombay; AIR 1955 SC 104** the recovery on the basis of the statement of the two accused was not found admissible under section 27 of the

Evidence Act. The facts of the instant case, however, are at variance as is evident from the evidence of P.W.10 and P.W.4, both of whom gave out that separate disclosure statements were given by the two appellants Sewa Singh and Mukhtyar Singh. Their evidence has been corroborated by the memo of disclosure statements (Ext. Ka.2) which was prepared at that time in the presence of the witnesses and copy of the same was given to the appellants who have put in their signatures also on it. It reveal that the two appellants after arrest were interrogated separately and appellant Sewa Singh gave out his own version and disclosure statement which was followed by separate and independent disclosure statement by appellant Mukhtyar Singh which resulted in recovery of their clothes from the house of the appellant Sewa Singh where the clothes were kept in a singly polethene bag. There appear to be no impropriety in preparing a single disclosure statement memo (Ext.Ka.2) although both the appellants were interrogated independently resulting the recovery. In the reported case of **Ram Kishan (supra)** it has in fact been insisted that the statement should be recorded as precisely as possible attributing the respective words to each accused whether they made the statements simultaneously or immediately one after the other before the discovery of the fact was made. this has precisely been done in this case as is evident form the evidence of both the witnesses and memo Ext. Ka.2 The cross-examination of P.W.4 and P.W.10 leave no manner of doubt that both the witnesses have stood the test ruling out the possibility of any material discrepancy and infirmity in their evidence about the disclosure statements leading to the recovery. The learned Sessions Judge has also rightly placed implicit reliance on their evidence in this regard.

44- Learned counsel argued that is highly improbable that the appellants would have retained these clothes till 29-8-2000 when out suspicion they were already picked up to medical examination on 20-8-2000. We find no force in this argument because the appellants knew very well that they are under surveillance right form the early hours of 20-8-2000 and could not thought of disposing of their blood and semen stained clothes for fear of being caught red-handed.

45- The clothes recovered with other incriminating articles including the clothes of the deceased etc were sent to Forensic Sicence Lab, Agra for report. The same is Ext.Ka.23 on the record. On scientific examination human semen was found on item no. 11 which is the under-wear of the deceased and item

nos. 18 and 21 the under-wears of appellants Sewa Singh and Mukhtyar Singh and further that spermatozoa were also found on these clothes. Likewise human blood was detected on time nos. 6 to 14 which included the clothes of the victim and also item no.7, the knife recovered at the pointing of appellant Sewa Singh and item nos. 16, 17, 19, and 20 which were the clothes of appellant Sewa Singh. The blood group-'B' was further detected on item nos. 8 to 12, the clothes of the victim, item nos. 16 and 17 , the shirt and trouser of the appellant Sewa Singh. These positive findings of the Forensic Science Expert therefore also sufficiently connect the appellants to the offences committed against the victim and the learned Sessions Judge was also justified in taking these circumstances having a ling with the other circumstances established in the case to prove that the appellants have made assault against the chastity of the victim and committed her murder.

46- Learned counsel for the appellant submitted that the presence of human blood on the knife, Ext. 1 can not safely be taken to infer that the same weapon was used in the commission of the crime of murder because the knife was not shown to the medical officer who performed post mortem on the dead body of the deceased so that his opinion could have been available about its use and sustaining of the corresponding injuries on the person of the deceased. There can be no doubt that the ante-mortem injuries of the victim were caused by sharp edged weapon and even if the knife, Ext.1, was not produced when the evidence of medical officer was recorded it will have no telling effect on the evidence of medical officer and the circumstances otherwise established by the evidence on record. Learned counsel for the appellants submitted that the prosecution did not adduce any link evidence to prove that the items recovered remained intact and were not tampered with till they were received in the Forensic Science Lab, Agra and were put to scientific examination. The evidence of P.W.10 is definite on this point that the items recovered were properly packed and sealed and were handed over at the police station. Expert's report (Ext. Ka.23) also reveal that the packets were received properly sealed and the seals of the packets tallied with the sample seal sent with the packets. Moreover there is nothing in the cross-examination of P.W.10 as may in any way indicate that there were opportunities to tamper with the recovered articles and therefore in the totality of the circumstances of the case the evidence of the prosecution regarding proper custody of the recovered articles can not be viewed with suspicion.

47- Referring to the statement of P.W.7, Smt. Rajvinder Kaur the learned counsel pointed out that the evidence of the sister of the victim does not indicate that the appellants were inimical towards the deceased and that in the absence of proof of motive the case of the prosecution based on circumstantial evidence can at best be said to be unreliable and its version improbable. Learned counsel also placed reliance on a decision of the Supreme Court in **Tanviban Pankaj Kumar Divetia Vs. State of Gujarat; 1997 C.A. R. 249** (SC) in support of the argument that where no direct evidence is available the motive assumes greater importance and if the motive has not been established the benefit go to the accused. The facts of the reported case were at variance because in that case the accused were not arraigned for having evil eye on the chastity of the female victim and therefore the insistence on proof of motive has no application to the facts of the instant case. In the present case the appellants had intended to make an assault on the chastity of the victim and therefore picked her up and in a situation like this question of proof of motive loses its significance and even if the evidence of P.W.7 is not positive in this regard it had no adverse effect on the credibility of the prosecution version.

48- The F.I.R. of the case was received by the concerned Magistrate on 19-9-2000 although the F.I.R. was registered on20-8-2000 and therefore the learned counsel for the appellants submitted that this being a glaring case of non-compliance of the provision of section 157 of the 'Code', the inordinate delay of sending the F.I.R. to the jurisdictional Magistrate is sufficient to disbelieve the entire prosecution version. We see no merit in this argument also because the prosecution was not supposed to gain anything by delaying the dispatch of the F.I.R. to the jurisdictional Magistrate as the F.I.R. was lodged against unknown assailant. Moreover as held by the Apex Court in **Balram Singh and another Vs. State of Punjab; 2003 AIR SCW 2656,** the delay in sending the F.I.R. to the jurisdictional Magistrate by itself would not weaken the prosecution case. Considering this also the submission of the learned counsel can safely be said to have no adverse impact on the interferences drawn on appreciation of the evidence of the prosecution.

49- it was also argued that the investigation of the case has not been fair right from the very beginning when the two appellants were taken into custody on 20-8-2000 without compliance of the provisions of sections 41, 42 or 160 of the 'Code' as well as mandate of Article 21 of the Constitution of India, and thereof the benefit of the defective investigation go to the defence and the

prosecution evidence need to be disbelieved. As stated above the two appellants on being tracked by the sniffer dog were taken for medical examination and even if there was non-compliance of some of the provisions that itself can not be made a ground to disbelieve the entire prosecution evidence. No material infirmity and prejudice to the appellants in the investigation had been found and therefore the submission of the learned counsel carry no conviction. The Apex Court in **Allarakha K. Mansuri Vs. State of Gujarat; 2002 AIR SCW 781** laid stress on the proposition that in murder case defective investigation byitself can not be made a ground for acquitting accused. Considering this also no benefit could be extended to the appellants on the plea raised by the learned counsel.

50- The two appellants were also saddled with the responsibility of committing unnatural offence punishable under section 377 I.P.C. read with section 34 I.P.C. on the basis of an abrasion around anus. Moreover separate charge against both the appellants were not framed under this section and only appellant Mukhtyar Singh was also charged under section 377 I.P.C. Neither taking resort to section 215 of the 'Code' the other appellant could have been convicted for this offence without a specific charge against him nor in our view the presence of abrasion could have safely be taken to convict the appellants under section 377 I.P.C. read with section 34 I.P.C. More so when the circumstances borne out of the evidence as discussed above lead to irresistible inference that the appellants had made attempt to commit rape on the victim which was resisted by her and she was thereafter fatally assaulted by the sharp edged weapon by the appellants at about 1.30 p.m. on 19-8-2000, in the sugar cane field of Sukhchain Singh within the territory of village Hasanpur, P.S. Kichha, District, Udham Singh Nagar. The appellants were acquitted of the charge under section 201 I.P.C. and appellant Sewa Singh was also acquitted of the charge under section 4/25 of the Arms Act in view of absence of any notification prohibiting possession of a knife in that locality. As stated above we are of the firm view that the charge against the appellant under section 377 I.P.C. read with section 34 I.P.C. has not been established beyond doubt and they need to be held not guilty of this offence. However in our considered view the evidence of the prosecution is sufficient to complete the chin of circumstances which prove that none other than the appellants made sexual assault on the victim Km. Sukhivinder Kaur and on resistence being put they committed her murder as alleged by the prosecution. The trial court has rightly

found them guilty of making attempt to commit rape punishable under section 376 I.P.C. read with section 511 I.P.C. and also for committing her murder punishable under section 302 I.P.C. read with section 34 I.P.C. and the judgment of conviction for these offences need to be and is hereby affirmed.

51- Learned counsel for the appellants submitted that the case does not fall in the category of the rarest of the rare case and therefore the capital punishment need to be modified into 'life imprisonment' for offence of murder of the victim. Both the appellants are in their early twenties and they have no previous criminal history. In a case of rape and murder of a minor school girl the Apex Court in the matter of **Amit alias Ammu Vs. State of Maharashtra; 2003 AIR SCW 3980** modified the death penalty into life imprisonment considering the age of the accused who was about 20 years old and had no record of any previous heinous crime and also there was no evidence that he will be a danger to the society if the death penalty is not awarded. We are of the view that on the facts of the instant case similar approach may be made and keeping in view cumulative facts and circumstances of the case the death sentence awarded to the appellants by the learned Sessions Judge need to be modified.

52- In view of the foregoing reason the appeal partly succeed. The conviction and sentence of the appellants under section 377 I.P.C. read with section 34 I.P.C. is set aside. The conviction of the appellants Sewa Singh and Mukhtyar Singh under section 302 I.P.C. read with section 34 I.P.C. and section 376 I.P.C. read with section 511 I.P.C. is however maintained. The death penalty awarded under section 302 I.P.C. read with sections 34 I.P.C. is modified and we award 'life imprisonment' to the appellants Sewa Singh and Mukhtyar Singh for the said offence. The sentence shall run concurrently. The appellants are in jail and they shall serve out the sentences awarded against them.

53- The criminal reference made by the leaned Sessions Judge under section 366 of the 'Code' is hereby rejected.

54- Let the record of the case be sent back to the court concerned for compliance. The compliance report be submitted within one month.

(Irshad Hussain, J.) **(S.H. Kapadia, C.J.)**

ISB